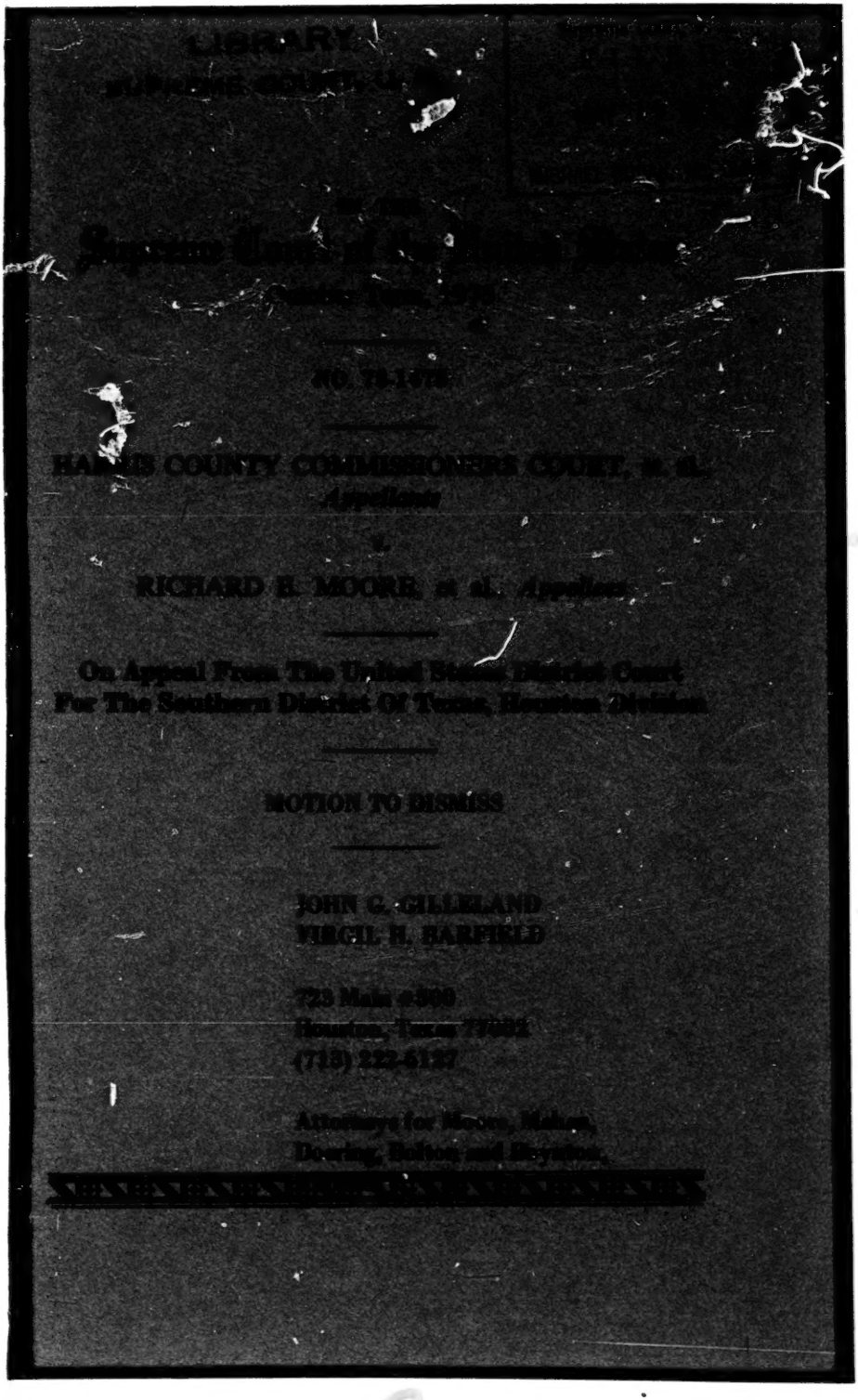

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Supreme Court, U.S.

NO. 78-1572

HARRIS COUNTY COMMISSIONERS COURT, et al.
Appellants

v.

RICHARD B. MOORE, et al., *Appellees*

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division

MOTION TO DISMISS

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Doering, Bolton and Boynton.

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and
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, et. al., *Appellants*

v.

RICHARD E. MOORE, et al., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

MOTION TO DISMISS THE APPEAL

Appellants have appealed from the judgment of a Three-Judge United States District Court for the Southern District of Texas, Houston Division, entered on January 30, 1974, declaring the Texas Statute, Article 2351½, Vernon's Annotated Texas Civil Statutes, to be facially unconstitutional, and permanently enjoining an order passed by the Harris County Commissioners Court which redistricted the County's eight justice of the peace and constable precincts declaring a vacancy in some of the offices of justice of the peace and constable thereby removing elected officials from office prior to the expiration of their terms of office.

This statement is submitted by Appellees, Moore, Bolton, Mahan, Doering and Boynton, pursuant to Rule 16, Section 1,

Paragraph D of the Supreme Court Rules, contending that the questions raised by Appellants in their Jurisdictional Statement have been previously answered by the Supreme Court and their appeal should therefore be dismissed.

ORDER AND OPINION BELOW

A copy of the judgment order issued January 30, 1974, of the Three-Judge United States District Court, for the Southern District of Texas, Houston Division, is appended hereto and marked Exhibit A. A copy of the written opinion of the Court, filed February 8, 1974, is appended hereto and marked Exhibit B.

QUESTIONS PRESENTED

Where a state stuatue permits a voluntary redistricting of the elective state constitutional offices of justice of the peace and constable, and when applied, the statutes effect is to remove some elected officials from office prior to the expiration of their terms of office, while permitting other elected officials of the same class to remain in office:

A.

When the statute is applied, under the circumstances existing herein, is the equal protection guarantee of the Fourteenth Amendment offended?

B.

When an elected official is removed from office, without cause, prior to the expiration of his term of office by virtue of a

redistricting order issued pursuant to provisions of a state statute, does said removal offend the rights of the electorate as guaranteed by the Fifteenth Amendment?

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 5, Section 18 and 24; Article 16, Section 14 of Vernon's Annotated Texas Constitution; Article 2351½ of Vernon's Annotated Texas Civil Statutes.

STATEMENT

This suit was brought by Appellees, under 28 U.S.C.A. 1343, 2201 and 2281; and 42 U.S.C.A. 1983 and 1985 (3), seeking to have declared unconstitutional a Texas Statute, viz., Article 2351½ (c), and to have set aside an order of the Appellants, the Harris County Commissioners Court, redistricting the eight justice of the peace and constable precincts, pursuant to the authority granted by Article 2351½ (c), see stipulations of evidence; which order, by reason of the effect of Article 2351½ (c), vacated the offices of five Appellees, all of whom had been previously elected, three of whom were justices of the peace and two of whom were constables, and all had at least one and one-half (1½) years before their terms of office expired. One Appellee, John Boynton, joined in the suit, as a representative of the class of citizens whose legal rights had allegedly been violated by the order of the Appellants on June 28, 1973.

The Appellants, the Harris County Commissioners Court, collectively comprise the general governing body of Harris County, Texas. The duties of a commissioners court under Texas law were reviewed at length in Avery v. Midland County, Texas, 88 S.Ct. 1114. One of their duties is to redistrict the justice of the peace and constable precincts "from time to

to time, for the convenience of the people". This authority is set out in Article 5, Section 18, of the Texas Constitution. See Exhibit C.

On January 12, 1973, the Appellants appointed a nine member committee to study and recommend to them new boundaries for the eight justice of the peace and constable precincts of the County. After several public meetings, various plans were considered and submitted to Appellants for consideration. On June 28, 1973, Appellants disregarded all plans submitted by the redistricting committee and adopted a plan submitted by Mr. Tom Bass, one of the Appellants herein. The "Bass" plan, as it became known, was adopted by Appellants and placed into effect three days after its adoption.

The stated purposes for redistricting the justice of the peace and constable precincts were to eliminate the gross population disparities existing between such precincts; to make the offices more convenient to all of the people of the County; and to draw new precinct boundaries along ethnic or racial lines so as to promote minority election to the offices of justice of the peace and constable in the future. The main consideraiton as contended by Appellants for redistricting was that the gross population disparity of the various precincts created a compelling state interest to bring about redistricting of the said justice of the peace and constable precincts.

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage com-

parison between the smallest precinct in square miles and the remainder of the precincts after redistricting, are shown in Exhibit F.

By virtue of Appellants' order of June 28, 1973, the new justice of the peace and constable Precinct 4 was established encompassing all of the old Precincts 4, 5 and 7, and portions of the old Precincts 1, 3 and 5. See Exhibits D and E for the geographical outlines of the eight precincts before and after redistricting.

Article 2351½ (c) was passed by the Legislature of Texas in 1965, and it provides as follows:

> "When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant." See Exhibit G.

Inasmuch that following redistricting, four justices of the peace and three constables of former precincts resided in new Precinct 4, all offices of the four justices of the peace and the three constables were declared vacant pursuant to the provisions

of Article 2351½(c). Afterwards, Appellants filled the vacancies in new Precinct 4 with one former justice of the peace and the other justice of the peace vacancy was filled by appointing a person of Appellants' choice who had never been elected to the office of justice of the peace. The constable vacancy in new Precinct 4 was filled by the appointment of one of the three former constables.

In its order issued January 30, 1974, the Three Judge District Court declared as follows:

"1. The Court has jurisdiction under Title 28, U.S.C.A. Section 2281.

2. The Texas statute, Article 2351½, Vernon's Annotated Texas Civil Statutes, is facially unconstitutional.

3. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined." See Exhibit A.

In its opinion issued February 8, 1974, the Court made the following findings:

> "Insofar as Article 2351½ operates to truncate the term of a duly elected justice of the peace or constable upon the circumstance that a convenience redistricting places him in a precinct with other such officers, it invidiously and irrationally discriminates between him and other such officers in other precincts not so effected."

and,

"That the effect of such statute in cutting short the terms of such officers constitutes an impermissable abridgement of the franchise of those voters who had voted for them or who had been entitled to vote for them."

In addition, the Court, after hearing all the evidence, stipulations and arguments of Counsel, found that no compelling state interest is served to justify such effects of the statute.

THE QUESTIONS ON APPEAL HAVE PREVIOUSLY BEEN ANSWERED BY THE COURT

A. The equal protection guarantee of the Fourteenth Amendment was violated by vacating the offices in question upon a mere convenience redistricting pursuant to Article 2351½(c).

(1)
MALAPPORTIONED PRECINCTS AFTER REDISTRICTING

The right to have one's vote count as equal to that of another is a basic constitutional principle. Gray v. Sanders, 83 S.Ct. 801; Massachusetts v. Burkhart, 207 F.Supp. 885,893.

In Avery v. Midland County, Texas, supra, the Court applied the principles that apply in this instance, to-wit:

A. That a state's political subdivision must comply with the Fourteenth Amendment.

B. The Fourteenth Amendment forbids election of local govermental officials from districts of disparate population.

C. The Equal Protection Clause reaches exercise of state

power however manifested, whether exercised directly or through subdivision of the state.

D. City, town or county may no more deny equal protection of the law than it may abridge freedom of speech, establish official religion, arrest without probable cause, or deny due process of law.

E. When state delegates law making power to local government and provides for election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have right to equally effective voice in election process.

F. Equal Protection Clause does not require that the state never distinguish between citizens, but only that distinctions that are made not be arbitrary or invidious.

In viewing Exhibit F, it is readily seen that the requirements of the Avery case, supra, have not been met. It is clearly shown therein that after the redistricting of June 28, 1973, new Precincts 1 and 5 had more than twice the number of residents of new Precincts 2 and 8. A vote cast by a citizen in either Precinct 2 or 8 for a justice of the peace or constable would count two and one-thirds (2 1/3) times more than a vote cast by a citizen in new Precincts 1 and 5 for the same offices.

Applying the test of "convenience of the people" to the redistricting of June 28, 1973, it certainly would not be as convenient for a resident of the new Precinct 4 which contains in excess of 593 square miles inside its boundaries as it would be for a resident of the new Precinct 6 which contains only 32 square miles inside its boundaries. See Exhibit F.

While the Court was concerned with the mandatory redistrict-

ing of units of local government with general governmental powers in the Avery case, supra, their holdings equally apply to units of local government with non general governmental powers when a voluntary redistricting is undertaken pursuant to a state statute.

A failure to apply the rights as guaranteed by the Equal Protection Clause pursuant to the holdings by the Court in the Avery case, supra, when voluntarily redistricting units of local government with no general governmental powers, resulting in grossly malapportioned precincts for justices of the peace and constables, who are paid from the general treasury of the county, then such redistricting scheme arbitrarily, invidiously and irrationally discriminates between a citizen of one precinct and a citizen of another precinct whose vote is 2 1/3 times greater.

(2)
THE LAW IS APPLIED DIFFERENTLY TO MEMBERS OF THE SAME CLASS.

Article 5, Section 24, of the Texas Constitution provides as follows:

Section 24. Removal of County Officers.

> Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetentcy, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Article 16, Section 14, of the Texas Constitution contains the

following provisions:

Section 14. Civil Officers; Residence; Location of Offices.

> Sec. 14. All civil officers shall reside within the state; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

By viewing Article 5, Section 24, of the Texas Constitution, it is readily seen that the Constitution has classified various elected officials as county officers, including justice of the peace and constables.

Article 16, Section 14, of the Texas Constitution further enumerates such classification of elective officials in Texas as either civil officers with statewide jurisdiction, district officers with district jurisdiction comprised of one or more counties and county officers, whose jurisdiction extends only within the boundaries of the county.

The authorities approving legislative or constitutional classification are so universally established that no citations are given herein. However, the criterion established for class legislation is fairly stated in State v. Erickson, 225 Iowa 1261, 282 N.W. 728. The test as to meeting the requirements of due process being whether the law operates equally upon all who come within the class so effected, embracing all persons who are or may be in like situations or circumstances and; the Constitution is offended where a public law is applied differently to different persons under the same or similar circumstances. Mayor of Savannah v. Savannah Distributing Co., Inc., 43 S.E. 2d 704.

To fulfill the requirements of due process, the law must be applied so that it operates equally upon all who come within the class so effected. By viewing Article 2351½(c), see Exhibit G; it is obvious that this statute fails to meet the test of due process when applied to legislative classification.

This case is a simplified example of Article 2351½(c) failing to meet the requirements of due process, to-wit:

The Appellees justices of the peace and constables were removed from office by the application of Article 2351½(c) simply because of where they resided after redistricting; while the justices of the peace and constables in old and new Precincts 1, 2, 3 and 8 remained in office simply because of where they resided after redistricting.

In addition to Article 2351½(c) failing to meet the test for due process for the reasons set out in the preceding paragraphs, the test of due process is not met when comparing Article 2351½(c) with Article 2351½(b). The latter guarantees the continuation in office of a county commissioner, who is also a county officer, when the commissioner precincts are redistricted even though he no longer resides in the precinct from which he was elected. While Article 2351½(c) provides for the removal of justices of the peace and constables, who are classed as county officers, when redistricting occurs and he no longer lives in the precinct from which he was elected. Thus, again, the law fails to be applied evenly to members of the same class.

Article 2351½, therefore, invidiously and irrationally discriminates against one elected official upon the circumstance that a mere convenience redistricting places him in a district with others thereby removing him from office, while others, of the same class are not so effected, and the due process clause of the Fourteenth Amendment is violated thereby.

B. The rights of the electorate as guaranteed by the Fifteenth Amendment are violated when an elected official, for whom they voted or for whom they had a right to vote, is removed from office without cause, prior to the expiration of the term of office of the elected official.

In Dyer v. Love, 307 F. Supp. 974, the Court restated the fundamental concept of the right to vote:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

Even in the limited instances where the right to vote has not yet been specifically recognized as being constitutionally required, as for certain state and local offices, the right to equal protection exists. This is, when a right to vote for a certain state or local official has been conferred by the state laws, that right must not be conferred in an arbitrary or invidiously discriminatory manner.

The Fifteenth Amendment specifically prohibits the abridgement of the vote. Thus the electorate's vote is abridged when the term of office of an elected official is cut short, without cause, upon the circumstance that a mere convenience redistricting places him in districts with others. This abridgement as authorized by Article 2351½(c) invidiously and irrationally discriminates between the effect of the voter who voted or was entitled to vote in the elected official's election and voters whose franchise was not so bobbed.

Article 5, Section 24, of the Texas Constitution, supra, provides for the removal of a county officer from office prior to the

expiration of his term of office. The Supreme Court of Texas in Childress County v. L.A. Sachse, 312 S.W.2d 380, interprets Article 5, Section 24, of the Texas Constitution. Among other things, the Court held as follows:

A. Where the State Constitution prescribes the manner of removing a county officer from office, neither the legislature, executive officers or the judiciary can act beyond the limitations of the Constitution. Vernon's Ann.St.Const., Art. 5, Sec. 24.

B. Exclusive jurisdiction to remove a county officer from office or to declare a vacancy in such office was vested by the Constitution in the District Court; and County Commissioners Court has no authority to determine right of one to a county office, remove him from such office or declare a vacancy therein. Vernon's Ann.St. Const., Art. 5, Sec. 24."

Thus, Article 5, Section 24, provides the only method of removing an elected county officer from office prior to the expiration of his term of office. Article 2351½, passed subsequent to the Childress County case, supra, attempts to remove an elected county officer from office by a convenience redistricting without following the law of the State, thereby abridging the vote of the electorate who voted or who could have voted for the county officer who is wrongfully removed from office prior to the expiration of his term of office, pursuant to the provisions of Article 2351½.

In Powell v. McCormack, 89 S.Ct. 1944 (1969), the United States Congress sought to exclude Powell, who had been duly elected from the 18th Congressional District of New York, from the 90th Congress. Congress sought exclusion by resolution and

prevented Powell's seating. No action was taken against Powell pursuant to constitutional provisions of impeachment. In concluding the case in Powell's favor, the Supreme Court said:

> "That since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership."

The essence of this ruling is that the Constitution determines who is qualified for membership to Congress as well as how he can be removed or excluded prior to the expiration of his term of office. If the Constitution is not followed in removing said Congressman, the effect is to abridge the vote of the electorate who elected him to office.

The ruling in the Powell case, supra, is analogous to the Texas law for removing an elected county officer from office prior to the expiration of his term of office. Removing a county officer from office prior to the expiration of his elective term, without cause, abridges the votes of the electorate who voted or who could have voted for such county officer in violation of the rights guaranteed by the Fifteenth Amendment.

NO ADEQUATE REMEDY EXISTS FOR APPELLEES UNDER TEXAS LAW

In State v. Rigsby, 43 S.W. 271 (Tex.Civ.App. 1897), twenty-one (21) years after the adoption of the present Texas Constitution, of which the Texas Supreme Court in a memorandum decision at 43 S.W. 1101 (1897), adopted the decision of the Court of Civil Appeals as the law of the state in the matter described therein. In the Rigsby case, supra, Rigsby, a justice of

the peace, sought reinstatement to office after being ousted from office because of realignment of the boundaries by the commissioners court. The Court in denying relief to the ousted elected official Rigsby, declared:

". . .the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. This is no anomaly in our law. All county officers whose compensation is derived from perquisites, and therefore depends to some extent on the territory in which they exercise their functions, hold their offices subject to lawful power to alter that territory. While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such action. Mechem,Pub. Off. Sec. 855."

In the subsequent case of Williams v. Castleman, 247 S.W. 263 (Tex.Sup.Ct.1922), the Texas Supreme Court reviewed at length the history of Article 5, Section 18, tracing it back to the Constitution of the Republic of Texas, and declared:

". . .The Constitution has prescribed that the power of determining the number of justice precincts, and of dividing the county into them, shall be exercised 'from time to time,' which means it has a potential existence at all times, and the division, redivision, or redetermination may be made at any time.

"It is thus seen that there is no limitation on the time when the commissioners' court may divide a county into justice precincts, and that, aside from the maximum and minimum

prescribed in the Constitution does not state how the power of division by the commissioners' court shall be exercised, nor does the statute.*** It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action."

The holdings of State ex rel. Dowlen v. Rigsby, supra, and Williams v. Castleman, supra, have been unanimously adhered to by the Texas courts in the following cases: Hastings v. Townsend, 136 S.W. 1143 (Tex.Civ.App. 1911, no writ history); Brown v. Meeks, 96 S.W.2d 839 (Tex.Civ.App. 1936, error dismissed); Meredith v. Sharp, 256 S.W.2d 870 (Tex.Civ.App. 1953, error refused, n.r.e.).

The 1965 enactment of Article 2351½(c) by the Texas legislature did not abolish the law as established in Rigsby, supra, and Castleman, supra, but rather narrowed the holdings of the cases. The provisions of the case law and Article 2351(c) both permit the removal of an elected official from office prior to the expiration of his term of office.

On January 29, 1974, the Attorney General of Texas in an advisory opinion, No. H-220, declared the Texas law to be as follows:

"Justices of the peace and constables, elected to a full four (4) year term of office, are entitled to serve the entire four years and a redistricting of their precincts by the commissioners court resulting in a justice of the peace or constable not living in the precinct from which he was elected, does not vacate his office."

In 1970, in McGuire v. Hughes, 452 S.W.2d 29 (Tex.Civ.App.) (1970, no writ), the Court declared that:

> "Judge McGuire, a justice of the peace, was duly elected to his term of office and placed in office for a four year term beginning January 1, 1969. During that period, he has the vested right and privilege to exercise the official duties of the office and to receive the compensation so provided by law. Such may not be denied him by administrative edict of the commissioners court in abolishing another office in the same precinct."

To test the good faith of the Texas Courts to determine whether or not the courts would consider a challenge to Article 2351½(c), Mr. C. R. Davis, a constable who had been elected in the 1972 General Elections for a full four year term, in old Precinct 4 of Harris County, Texas, and whose office was declared vacant on June 28, 1973, by Appellants' order complained of herein and who is not an Appellee herein, filed suit in the Supreme Court of Texas on March 28, 1974, in the nature of a writ of mandamus as provided by the law of Texas. In the petition for such writ, a direct challenge of Article 2351½(c) was made and the laws as declared by the Attorney General's Opinion No. H-220, supra, and McGuire v. Hughes, supra, was sought to be either affirmed or denied.

On April 10, 1974, the Supreme Court of Texas, in Cause No. B-4542, styled C. R. Davis v. Steven C. Oaks, et. al., not yet reported, refused to hear said mandamus and in essence refused any challenge of Article 2351½(c).

In light of the decisions of the Supreme Court of Texas in State v. Rigsby, supra; Williams v. Castleman, supra; and C.R. Davis v. Steven C. Oaks, et. al., supra, no adequate remedy ex-

ists under Texas law to resolve the issues that were resolved in Appellees favor on January 30, 1974, by the Three Judge District Court in its Order. See Exhibit A.

NO COMPELLING STATE INTEREST WAS SERVED BY REDISTRICTING PURSUANT TO ARTICLE 2351½(c)

The only theory of compelling state interest offered by Appellants to the Three Judge District Court to justify the effects of Article 2351½(c), thereby abrogating those rights as guaranteed by the Fourteenth and Fifteenth Amendments, was the fact that the population had grown disproportionate over some ninety-six years since the boundaries of the old precincts were established.

But by viewing Exhibit F, the order of Appellants of June 28, 1973, did not resolve the problem of disproportionment in the justice precincts, but only made such disproportionment less severe. Had Appellants sought to make each new justice precinct conform to the one man-one vote principle and had there been a closer conformity in the precincts in area, then they could in good faith make a contention of compelling state interest.

The Three Judge Court, which heard the evidence of all parties, heard the arguments of all counsel therefor, was in the position to best judge whether Appellants' contentions justified the denial of the rights as guaranteed by the Fourteenth and Fifteenth Amendments.

The Court concluded, after all parties had been given the opportunity to be heard, as follows:

". . .insofar as Article 2351½ operated to end the term of a duly elected official upon the circumstance of a mere con-

venience redistricting, it invidiously and irrationally discriminates against the official and the electorate who voted for him or were entitled to vote for him and voters whose franchise was not so bobbed."

The Court further held:

"The new districts were clearly not drawn with population equality in mind; nor would population equalization, if seen as a compelling reason for redistricting, bear any necessary relation to vacating these offices, a different consideration entirely."

CONCLUSION

It is submitted that the questions presented by Appellants' appeal have previously been answered by the Court and no necessity exists to hear said appeal; that this appeal in all things should be dismissed.

Respectfully submitted,

JOHN G. GILLELAND

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CERTIFICATE OF SERVICE

The undersigned counsel for the Appellees do hereby certify that on this the 9th day of May, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' and Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Motion To Dismiss The Appeal".

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All parties required to be served have been served.

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JOHN G. GILLELAND

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APPENDIX

This appendix contains the following listed exhibits:

Exhibit A —Judgment Order of the District Court

Exhibit B — Opinion of the District Court

Exhibit C — Article 5, Section 18, Vernon's Annotated Texas Constitution

Exhibit D — Precinct Map before dedistricting

Exhibit E — Precinct Map after redistricting

Exhibit F — Population and Area Comparison Before and After Redistricting

Exhibit G — Article 2351½, Vernon's Annotated Texas Civil Statutes

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos, 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOTT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and a a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V, Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S. C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

/s/ _____
Thomas G. Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

> (c) When boundaries of justice of the peace precincts are cnanged, so that existing precincts are

1. Tex. Const. Art. 5, §18.

> altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices. These offices are the creation of state law; the jurisdiction

of the offices in question is statewide,[2] and the statute attacked is of statewide effect and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes,* 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden.*

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Owens,* 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden.*

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrele-

2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

vant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

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4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

Article 5, Texas Constitution

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Section. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. Divisions shall be made by the Commisisoners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

EXHIBIT D

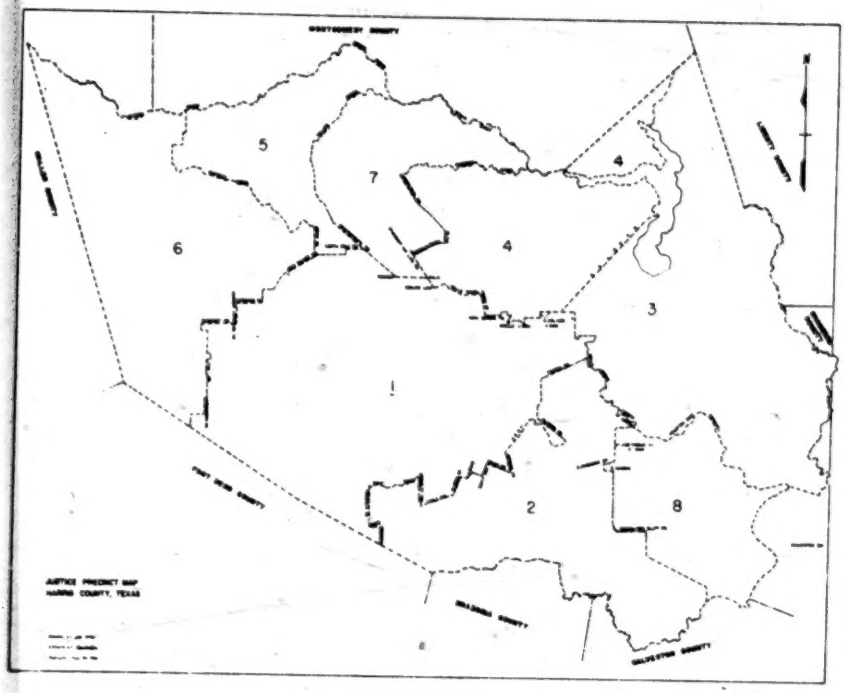

EXHIBIT E

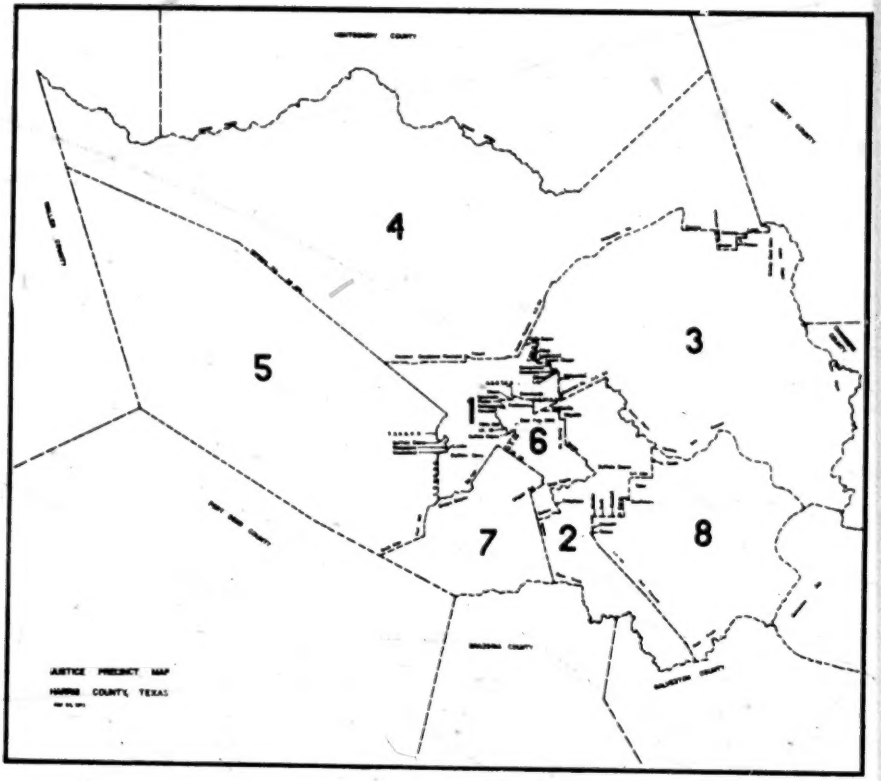

EXHIBIT F

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage comparison between the smallest precinct in square miles and the remainder of the precincts after redistricting, are as follows:

PCT. NO.	POPULATION BEFORE	POPULATION AFTER	POPULATION DIFFERENCE AFTER	POPULATION PERCENTAGE COMPARISON AFTER	AREA IN SQUARE MILES AFTER	AREA PERCENTAGE COMPARISON AFTER
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	BASE NUMBER	BASE NUMBER	88.0	5.0%
3.	111,106	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

*The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

*The total number of square miles in Harris County, Texas is 1750.

EXHIBIT G

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commisisoners precincts are changed, the terms of office of the commisisoners then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that

precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.